INEXCO OIL CO.

IBLA 85-632 Decided July 29, 1986

Appeal from a decision of the California State Office, Bureau of Land Management, cancelling oil and gas lease CA 9742.

Affirmed.

1. Oil and Gas Leases: Cancellation -- Oil and Gas Leases: Lands Subject to -- Oil and Gas Leases: Noncompetitive Leases

An oil and gas lease, issued in response to an over-the-counter offer to lease, may properly be canceled by BLM where the lands described in such lease had been included in a prior lease, since terminated, and BLM failed to post such lands to its list of lands available for simultaneous oil and gas lease applications.

APPEARANCES: Stephen F. Noser, Esq., Associate General Counsel, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Inexco Oil Company appeals from a decision of the California State Office, Bureau of Land Management (BLM), dated April 19, 1985, cancelling oil and gas lease CA 9742, which embraced 640 acres in sec. 34, T. 16 S., R. 17 E., San Bernardino Meridian. The BLM decision stated that when this lease issued, Section 34:

> was included in terminated oil and gas lease R 3564 and was available for leasing only under the simultaneous leasing process pursuant to 43 CFR 3112. Lease CA 19742 [sic] issued under the provisions in 43 CFR 3111.
>
> In view of the foregoing, oil and gas lease CA 9742 was improperly issued and is hereby cancelled in its entirety.

The case record indicates appellant filed a noncompetitive "over-the-counter" oil and gas lease offer with BLM on May 11, 1981. The offer had included additional land, but in an earlier decision, dated June 3, 1982, BLM rejected appellant's offer as to all but Section 34.

This earlier decision stated in part:

> Offer CA 9742 is rejected further as to the N 1/2 of Sec. 2, T. 17 S., R. 17 E., as the lands are available for lease only thru the Simultaneous Oil and Gas Leasing Program.
>
> There are no objections to issuing a lease for Section 34, T. 16 S., R. 17 E., SBM, containing 640.00 acres. Accordingly, a lease has been issued for these lands. [1/]

The record includes a copy of page 3 of the Historical Index for T. 17 S., R. 17 E., San Bernardino Meridian, which indicates that oil and gas lease R 3564, dated October 1, 1974, terminated October 1, 1976, and that it included 320 acres comprising the N 1/2 of sec. 2, in T. 17 S., R. 17 E., San Bernardino Meridian. This entry cross-referenced T. 16 S., R. 17 E. The Historical Index for T. 16 S., R. 17 E., indicates this same oil and gas lease (R 3564) also included all of Section 34. 2/ This is also confirmed by the copy of the serial register page for lease R 3564. Nevertheless, appellant's lease issued effective July 1, 1982, for Section 34. Appellant has paid $640 rental yearly since issuance of lease CA 9742. 3/

In its statement of reasons for appeal, appellant argues that the Department should not now cancel a lease, which has been in effect a number of years, as a result of a recently discovered and trivial defect. Appellant emphasizes the need for certainty of title to Federal leases and asserts the 90-day statute of limitations found in 30 U.S.C. § 226-2 (1982) should apply to the Federal Government. It insists the Department has discretion in equity to avoid cancelling the lease in view of appellant's years of rental payments and the triviality of the procedural defect involved, or, at least, to refund the money appellant has invested in it. It objects to issuance of this decision without notice, finding this proceeding to be arbitrary, capricious, and a taking of its property without due process of law, in violation of the United States Constitution.

[1] Departmental regulations provide that lands which were subject to terminated leases may be leased only in accordance with simultaneous oil and gas lease regulations.

> All lands which are not within a known geological structure of a producing oil or gas field and are covered by canceled

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1/ Inexco's attempted appeal of the June 3, 1982, decision was not timely. Timely filing of a notice of appeal is jurisdictional. Ilean Landis, 49 IBLA 59 (1980). Since the appeal was filed after the grace period, BLM correctly denied consideration of the appeal pursuant to 43 CFR 4.411(c). Ilean Landis, supra at 62

2/ In its 1982 decision, BLM rejected appellant's offer to lease the N 1/2 sec. 2, T. 17 S., R. 17 E., because of lease R 3564, the same lease cited in its 1985 decision.

3/ The record indicates that on June 10, 1985, after this appeal was filed, appellant submitted the rental payment for the lease year beginning July 1, 1985.

> or relinquished leases, leases which automatically terminate for non-payment of rental pursuant to 30 U.S.C. 188, or leases which expire by operation of law at the end of their primary or extended terms are subject to leasing only in accordance with this subpart. [Subpart 3112 -- Simultaneous Filings]. [Emphasis added.]

43 CFR 3112.1-1 (1982). 4/ The case record indicates that the land in appellant's lease should have been subject to simultaneous filing, and that BLM improperly issued this lease in response to appellant's over-the-counter offer. Prior to acceptance of any over-the-counter offers for the lands described in appellant's offer, BLM was required by 43 CFR 3112.1-1 to post these lands to its list of lands available for simultaneous oil and gas lease applications. In the absence of such posting, the lands were not available for over-the-counter leasing, and any over-the-counter lease issued was void as to such lands. Paul S. Coupey, 64 IBLA 146, 147 (1982); Husky Oil Co., 52 IBLA 41, 42 (1981).

An improperly issued lease is subject to cancellation. 43 CFR 3108.3(b). Thus, the Secretary of the Interior has the authority to cancel a lease issued contrary to law because of the inadvertence of his subordinates. Boesche v. Udall, 373 U.S. 472 (1963); Husky Oil Co., supra. A lease issued for lands in an over-the-counter offer may be cancelled where such lands were included in a previous lease, since terminated, and the lands have not been posted in accordance with 43 CFR 3112. Paul S. Coupey, supra; Claude C. Kennedy, 12 IBLA 183 (1973). In the event a lease has been issued on the basis of an application or offer which should have been rejected, BLM must take action to cancel the lease unless the rights of a bona fide purchaser have intervened. Appellant does not allege the existence of a bona fide purchaser. 5/

Therefore, we must find BLM properly cancelled appellant's lease. It is unfortunate that appellant may have been disadvantaged by cancellation of this lease, particularly by such avoidable error.

Appellant points to a lack of other interest in the leased lands in an attempt to establish a favorable position in equity. Under 43 CFR 3112.7 (1982), posting for simultaneous leasing only had to be repeated if more than 10 applications for the land were received at the first drawing and only for a maximum of three drawings before the lands became available for regular over-the-counter noncompetitive offers under 43 CFR 3111. Stanley Ustan, 71 IBLA 116, 118 n.2 (1983). However, under the circumstances of this case, equity will not lie. The regulations provide that the lands must be made

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4/ This paragraph was amended on July 22, 1983. See 48 FR 33678; 43 CFR 3112.1-1(a). The portion of the regulation pertinent to this decision was not changed.

5/ We recognize the dichotomy in the treatment of original lessees and bona fide purchasers in this regard. See e.g., George P. Wolter, Jr., 47 IBLA 396 (1980); but see Fortune Oil Co., 69 IBLA 13 (1982).

subject to simultaneous leasing procedure prior to their availability for over-the-counter leasing. This had not been done, and thus, BLM was without authority to issue the lease to appellant.

Appellant objects to the uncertainty of title that could result from the potential for administrative cancellation of leases. In support of its position appellant cites 30 U.S.C. § 226-2 (1982), which provides that no action contesting a decision of the Secretary of the Interior involving an oil and gas lease "shall be maintained" unless the action is commenced within 90 days from the date of the final decision. However, this statutory provision is addressed to third party actions challenging final agency decisions. It has no relevance to actions by the Secretary with respect to leases that have been improperly issued. The Secretary has clearly retained authority to deal with such a situation. "Leases shall be subject to cancellation if improperly issued." 43 CFR 3108.3(b). The regulations contain no provision imposing any time limitation on that authority.

The BLM decision did not specify that appellant's yearly rentals would be refunded. Under the circumstances it would seem appropriate for BLM to refund all rental tendered for lease CA 9742. See Emery Energy, Inc., 90 IBLA 70, 77 (1985); Conoco, Inc., 75 IBLA 83 (1983); Husky Oil Co., supra; Robert B. Ferguson, 9 IBLA 275 (1973).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the California State Office is affirmed.

R. W. Mullen
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge